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Jones v. Murray: Allowing the Government to Get Blood from a Stone

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JONES V. MURRAY: ALLOWING THE GOVERNMENT TO GET BLOOD FROM A STONE

In recent years, the courts have gradually drained the lifeblood from the Fourth Amendment of the United States Constitution,[1] leaving the carcass of individual liberty to bake under the sun of the government's transgressions.[2] In effecting this circumspection of individual liberty, the courts employ an analytical framework establishing exceptions to the warrant, probable cause and particularization requirements of the Fourth Amendment.[3] The decision of the United States District Court for the Western District of Virginia in *Jones v. Murray*,[4] and the recent opinion of the Fourth Circuit substantially affirming it, constitute the most recent and most troubling effort yet to relax Fourth Amendment protection. As a result of the *Jones* decisions, states are granted a license to search individuals without a warrant, without reasonable suspicion of criminal wrongdoing and without any articulation of particularized suspicion. This grant appears to be of little incremental significance in light of the United States Supreme Court's decisions in *Skinner v. Railway Labor Executives' Association*[5] and

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1. The Fourth Amendment guarantees that:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. Commentators have chronicled extensively the alarming willingness of courts to erode Fourth Amendment protection over the past several years. *See, e.g.*, Michael J. Flannery, Note, *Abridged Too Far: Anticipatory Search Warrants and the Fourth Amendment*, 32 WM. & MARY L. REV. 781, 784-807 (1991) (describing the origin of the Fourth Amendment and development by the Supreme Court of principles related to it).

3. *See infra* notes 39-67 and accompanying text.

4. 763 F. Supp. 842 (W.D. Va. 1991), *aff'd in part and rev'd in part*, No. 91-6057, 1992 U.S. App. LEXIS 6322 (4th Cir. Apr. 7, 1992).

5. 489 U.S. 602 (1989). For a discussion of the *Skinner* Court's holding and ratio-

National Treasury Employees Union v. Von Raab[6] sanctioning warrantless and suspicionless searches. However, the context in which the *Jones* search was conducted varies considerably from the contexts reviewed by the Court in these cases. In *Skinner* and *Von Raab*, the searches at issue were conducted in employment settings to find evidence of *current or past* employment rule violations. In contrast, the *Jones* search was conducted to find evidence of a crime that might be committed *in the future*. If *Skinner* and *Von Raab* were the pride of lions bringing the Fourth Amendment to its knees through their evisceration of antecedent governmental justification for searches for evidence of current or past crimes, *Jones* is the vulture picking at the carrion of remaining safeguards by extending this carnage to searches for evidence of future disobedience. The numerous flaws of the *Jones* decisions and implications of the *Jones* search provide the basis for this comment.

In 1990, the General Assembly for the Commonwealth of Virginia enacted Section 19.2-310.2 of the Virginia Code (the "Code") which provides:

> [e]very person convicted of a felony on or after July 1, 1990, and every person convicted of a [felony sex offense] who was incarcerated on July 1, 1989, shall have a sample of his blood taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. The analysis shall be performed by the Bureau of Forensic Science within the Division of Consolidated Laboratory Services, Department of General Services.[7]

The "identification characteristics" garnered from these analyses are to be stored and maintained by the Bureau of Forensic Science (the "Bureau") in a DNA data bank.[8] The Code further provides that the identification characteristics contained in the data bank may be released to "federal, state and local law-enforcement officers upon request made in furtherance of an official investiga-

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nale, see *infra* notes 52-60 and accompanying text.

6. 489 U.S. 656 (1989). For a discussion of the *Von Raab* Court's holding and rationale, see *infra* notes 61-66 and accompanying text.

7. VA. CODE ANN. § 19.2-310.2 (Michie 1990). The *Jones* court noted that "[a]t least eleven states have enacted DNA statutes similar to Virginia's statute based on recidivism rates of convicted felons." *Jones*, 763 F. Supp. at 846 n.8.

8. VA. CODE ANN. § 19.2-310.2. *See also id.* § 19.2-310.4 (prescribing methods for storing and maintaining analyses).

tion of a criminal offense."[9] As the district court in *Jones* determined, "the data bank is being developed to aid law enforcement officials in investigating future violent crimes"[10] and "may be accessed for this purpose only."[11]

On October 9, 1990, Lawrence Jones and other Virginia prisoners filed an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Western District of Virginia challenging the constitutionality of the Virginia DNA data bank statute.[12] The plaintiffs based the constitutional challenge on the argument, *inter alia*, that the taking of blood and subsequent analysis thereof violates the Fourth Amendment prohibition against unreasonable searches and seizures.[13]

On October 12, 1990, the court denied the plaintiffs' motion for a temporary restraining order and preliminary injunction.[14] The court granted the state's motion for summary judgment on March 4, 1991. The Fourth Circuit affirmed the district court's decision that the DNA testing does not constitute an unreasonable search and seizure.[15]

The district court reasoned that the DNA search fell within the confines of Fourth Amendment jurisprudence and, more particularly, the special needs exception to the Fourth Amendment.[16] Applying a balancing test, the court concluded that the state's interest

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9. *Id.* § 19.2-310.5.

10. *Jones*, 763 F. Supp. at 844 (citing VA. CODE ANN. § 19.2-310.5).

11. *Id.* (citing VA. CODE ANN. § 19.2-310.6).

12. *Id.* at 843. Jones and his co-plaintiffs also moved for class certification at this time. *Id.* The motion was denied on October 12, 1990. *Id.* In response to a consent motion for class certification filed by all parties on October 18, 1990, the court, on October 26, 1990, "certified a class of all felons who have been or will be convicted of a felony under the laws of the Commonwealth of Virginia and who will be subject to blood tests for DNA analysis pursuant to Va.Code Ann. § 19.2-310.2" *Id.*

13. *Id.* at 844. In addition, the plaintiffs challenged the validity of the Virginia statute on the grounds that the statute violates their right to privacy and that blood testing of those plaintiffs convicted prior to the statute's effective date violates the *Ex Post Facto* Clause of the Constitution and interferes with their "vested liberty interest in mandatory parole because the blood test constitutes a condition of parole." *Id.* Discussion of these alternate grounds for decision is beyond the scope of this comment.

14. *Id.* at 843.

15. Jones v. Murray, No. 91-6057, 1992 U.S. App. LEXIS 6322 (4th Cir. Apr. 7, 1992), *aff'g in part and rev'g in part* 763 F. Supp. 842 (W.D. Va. 1991). The Fourth Circuit reversed on the narrow ground that the DNA statute violated the Constitution's prohibition against ex post facto laws by requiring that releases to be made pursuant to the state's mandatory parol law be delayed long enough for prison officials to collect blood samples. *Id.* at *25.

16. *Jones*, 763 F. Supp. at 844-46.

in deterring and detecting recidivist acts significantly outweighed the plaintiffs' privacy interests.[17] Thus, according to the *Jones* court, withdrawal of blood and subsequent DNA analysis conducted with the intention of deterring and detecting potential future crime is a reasonable search and does not abridge the Fourth Amendment.[18]

The Circuit panel agreed that the state's interest in collecting the DNA samples outweighed prisoners' privacy interests, but it found reliance on the special needs exception unnecessary.[19] It likened the DNA testing to fingerprinting and therefore concluded that no individualized suspicion was required for the search.[20]

This comment argues that, contrary to the opinion of the courts, the *Jones* search should be deemed *per se* unconstitutional. The courts' reasoning was technically flawed in several respects.[21] In addition, the *Jones* search transgresses the historical premises of the Fourth Amendment.[22] Furthermore, prior to *Jones*, Fourth Amendment jurisprudence was confined to searches in which an identifiable suspicion of current or past disobedience existed, a suspicion which would be presently confirmed or denied by the results of the search. The search conducted in *Jones*, however, was a prospective search, a search for evidence of crimes about which the state could have no knowledge because the crimes have yet to occur and, in fact, may never happen. Thus, it is not certain that the state would ever use the fruits of the *Jones* search to confirm or deny the guilt of an individual. This comment argues that the uncertainty of future events renders the *Jones* search unconstitutionally arbitrary.[23] Finally, the policy implications of allowing states to justify any search on the basis of a need to detect or deter future crimes buttress the conclusion that the search in *Jones* violates the Fourth Amendment.[24]

I. BACKGROUND

The demise of Fourth Amendment protection at the hands of

17. *Id.* at 846-48.
18. *Id.* at 848.
19. *Jones*, 1992 U.S. App. LEXIS at *13 n.2.
20. *Id.*
21. *See infra* text accompanying notes 104-21.
22. *See infra* text accompanying notes 122-23.
23. *See infra* text accompanying notes 124-29.
24. *See infra* text accompanying note 130.

the Court has become legendary, its opinions rendering "[c]urrent search and seizure doctrine inconsistent and incoherent."[25] During the past two decades, the Court has forced the amorphous text of the Fourth Amendment through doctrinal sieves of ever-decreasing diameters. The result is a morass of *ad hoc* exceptions carved from the Fourth Amendment, reducing it to a quivering mass of ineffective safeguards against the state's intrusion on the rights of its citizens.

The well-documented history of the Fourth Amendment evidences an intent to fetter the state's unbridled discretion during the 1700's. English customs officers, through empowerments called writs of assistance, entered and searched buildings owned by American colonists whenever the officers suspected the presence of smuggled goods.[26] These writs of assistance were general search warrants which authorized a civil officer and his deputies to "search any house, shop, [or] warehouse, break open doors, chests, packages, in case of resistance; and remove any prohibited or uncustomed goods or merchandise."[27] The writs granted officials unbridled discretion, allowing them "continuous license" to search wherever and whenever they suspected the presence of smuggled goods.[28]

Americans of the revolutionary era despised writs of assistance. In 1761, James Otis, Jr., representing sixty-three Boston merchants, spoke out against them in a court hearing. Otis called the writs "the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book."[29] John Adams, a spectator at the hearing, later recalled:

"[Otis] was a flame of fire! . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance . Then and there the Child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free."[30]

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25. *Phyllis T. Bookspan, Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 474 (1991).

26. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (1970).

27. *Id.* at 53.

28. *Id.* at 54.

29. *Id.* at 59.

30. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1, at 4 (1978) (quoting 10 CHARLES ADAMS, THE LIFE AND WORKS OF JOHN ADAMS 247-48 (1856)).

Article 10 of the Virginia Bill of Rights of 1776 was the "first American precedent of a constitutional character for the Fourth Amendment."[31] Virginia's Patrick Henry, leader of the drive to formulate a bill of rights for the United States Constitution, drew upon the Virginia Constitution as a model for the express protection of individual liberty at the expense of a strong central government.[32] In particular, Henry decried the potential unbridled authority of federal sheriffs acting under authority of general warrants and at a distance from their superiors.[33] Both houses of the federal Congress enacted the Fourth Amendment as it now exists.[34]

Initially, the express mandates of the Fourth Amendment were strictly construed. As recently as 1967, the Court reaffirmed the need for a warrant prior to a constitutional search or seizure, announcing in *Katz v. United States* that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."[35] The Court extended its literal interpretation of Fourth Amendment requirements by insisting that officers demonstrate probable cause[36] and particularized suspicion[37] prior to custodial

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31. LASSON, *supra* note 26, at 79. Article 10 provided:

> [t]hat general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

2 BENJAMIN P. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 1909 (2d ed. 1972).

32. *Id.* at 92-93.

33. *Id.* at 92.

34. *Id.* at 101-02.

35. 389 U.S. 347, 357 (1967) (citations omitted). The Court noted that law enforcement officers had sufficient probable cause to obtain a warrant allowing use of electronic surveillance equipment to record the defendant's conversation, but it reversed the conviction because the officers had failed to secure such a warrant. *Id.* at 359.

36. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (totality of the circumstances approach); Beck v. Ohio, 379 U.S. 89, 91 (1964) (necessity of probable cause for a warrantless search); Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (concluding that standard for a warrant differs from standard for warrantless search, but both standards require reasonable belief in guilt); *see also* 1 LAFAVE, *supra* note 30, § 3.1, at 437 ("Central to the protection of [the right to be left alone] is the concept of 'probable cause, for under the Fourth Amendment the police may not make and arrest or search unless they have probable cause to do so."); Alexander E. Eisemann, Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amend-*

arrests or searches. The combination of these three requirements, the existence of a warrant prior to a search, probable cause and particularized suspicion, provided a framework faithful to the precepts of the Fourth Amendment by prohibiting police from encroaching on the privacy right of individuals absent a "reasonable ground for belief in guilt."[38]

In the years since *Katz*, the Court has seized upon the exceptions language of the opinion's oft-cited rule to carve out a burgeoning variety of "necessity-mandated" exceptions to the express requirements of the Fourth Amendment.[39] These exceptions include stop and frisk searches,[40] searches incident to arrest,[41] searches of vehicles,[42] consent searches,[43] exigent circumstance searches,[44] inventory searches[45] and searches in which "special

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ment Violations, 63 B.U. L. Rev. 223, 227 (1983) (stating that the "probable cause requirement establishes a threshold level of information that police must gather before they can exercise search or seizure powers").

37. Particularization has traditionally been a pertinent factor in Fourth Amendment jurisprudence. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 654-60 (1979) (finding random warrantless stops too broad a search for discovering unlicensed drivers and unregistered cars, especially in light of adequate alternatives); United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976) (noting that police must generally possess some quantum of individualized suspicion prior to invading an individual's privacy).

38. Carroll v. United States, 267 U.S. 132, 161 (1925) (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (1881)). This literal construction of the Fourth Amendment's demands performs an important practical function: providing clear guidance to law enforcement personnel as to the requirements for a constitutional search or seizure. *Cf.* New York v. Belton, 453 U.S. 454, 458-60 (1981) (determining that Fourth Amendment protection could best be realized if the police have a single familiar standard to follow when conducting a vehicle search incident to arrest of the occupants).

39. *See* California v. Acevedo, 111 S.Ct. 1982, 1992 (1991) (Scalia, J., concurring) ("Even before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable."). Justice Scalia cited Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985), as "catalog[ing] nearly 20 such exceptions."

40. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (holding that a person could be detained for a brief period of time without a warrant and without probable cause if a police officer has a *reasonable suspicion* that the person is armed and presently dangerous and the search "[is] reasonably related in scope to the circumstances which justif[y] the interference in the first place").

41. *See, e.g.*, Chimel v. California, 395 U.S. 752, 768 (1969) (allowing the search of a person arrested and the area within his immediate control, but refusing to permit warrantless searches of the entire home where a person is arrested).

42. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 48-51 (1970) (holding that an automobile, because of its mobility, may be searched without a warrant if there is probable cause to believe evidence of a crime will be found in it).

43. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 222-23 (1973) (holding that the voluntariness of consent is to be determined from all the circumstances and that knowledge of the right to refuse is one of many factors to be considered).

44. *See, e.g.*, Cupp v. Murphy, 412 U.S. 291, 296 (1973) (holding that warrantless

needs beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable."[46] In each of these cases, the Court focused its analysis on the reasonableness language of the Fourth Amendment so that it could eliminate the warrant and probable cause requirements while retaining the particularization requirement.[47] The Court replaced the rejected requirements with a balancing test which weighs the government's interest in conducting a search against the legitimate expectation of privacy of the individual being searched.[48] With each exception, the Court succeeded in incrementally reducing Fourth Amendment protection by according broad deference to the government's interest.[49] This diminution of Fourth Amendment protection culminated in the warrantless, suspicionless and nonparticularized searches sanctioned by the Court in *Skinner v. Railway Labor Executives' Association*[50] and *National Treasury Employees Union v. Von Raab*.[51]

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search and seizure is reasonable if destruction of evidence is imminent).

45. *See, e.g.*, Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (upholding police search of an arrestee's property for inventory purposes prior to incarceration).

46. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). The Court has recognized maintenance of an efficient and proper government workplace, O'Connor v. Ortega, 480 U.S. 709, 723-24 (1987), stifling importation of illegal contraband, United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985), and maintenance of orderly classrooms, New Jersey v. T.L.O., 469 U.S. 325, 340 (1985), as special needs justifying warrantless searches.

47. *T.L.O.*, 469 U.S. at 337; *Lafayette*, 462 U.S. at 643; *Cupp*, 412 U.S. at 295-96; *Schneckloth*, 412 U.S. at 242-43; *Chambers*, 399 U.S. at 52; *Chimel*, 395 U.S. at 764-65; *Terry*, 392 U.S. at 19.

48. *See, e.g.*, *T.L.O.*, 469 U.S. at 337. Applying the balancing test in *T.L.O.*, the Court determined that:

> a search of a student by a school official will be 'justified at its inception' when there are reasonable grounds for suspecting the search will turn up evidence that the student has violated or is violating either the law or the rules of the school [and is] permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.

Id. at 342-43 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

49. *See* Bookspan, *supra* note 25, at 474 n.4 (discerning a clear trend of judicial deference to the government after reviewing cases before the Court in 1959, 1969, 1979 and 1989). *See also*, Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 875-903 (1990) (documenting the Court's strong deference to the government's interests which served to circumscribe the rights of individuals throughout the 1988-89 Term).

50. 489 U.S. 602 (1989).

51. 489 U.S. 656 (1989).

The Court in *Skinner* considered the constitutionality of Federal Railroad Administration regulations mandating toxicological testing of the blood, urine and breath of employees involved in "major train accidents" or rule violations and authorizing toxicological testing of employees in other circumstances.[52] The Court found that "special needs" made it impractical for the government to obtain a warrant[53] or to articulate either probable cause[54] or reasonable suspicion,[55] and it reasoned that the circumstances therefore required a test less strict than that typically employed in the criminal context.[56] To determine whether or not the searches were reasonable, the Court balanced the privacy interests of the employees against the government's interest in testing.[57] Focusing on the potential for "great human loss" and the inability to adequately detect drug use by other means, the Court found the government's interest in testing railway employees for drug use compelling.[58] On the other side of the balance, the Court found that annual physical examination requirements reduced the employees' privacy expectations.[59] Concluding that the government's interest outweighed the employees' expectation of privacy, it upheld drug testing of railroad employees involved in serious accidents or rule violations.[60]

Von Raab involved a constitutional challenge to Customs Service regulations which required employees placed, i.e., hired, transferred or promoted, into certain positions to be tested for drug use as a condition of such placement.[61] The Customs Service required drug testing for positions involving "front-line" drug interdiction or requiring employees to carry firearms or handle classified materials.[62] Addressing each type of position separately, the Court balanced the government's interest in testing against the employees' expectations of privacy.[63] It upheld testing of front line interdiction forces, finding that the government has a "compel-

52. 489 U.S. at 606, 609.
53. *Id.* at 624.
54. *Id.*
55. *Id.*
56. *Id.* at 620.
57. *Id.* at 633.
58. *Id.* at 628-30.
59. *Id.* at 628.
60. *Id.* at 633.
61. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 660 (1989).
62. *Id.* at 660-61.
63. *Id.* at 664-65.

ling interest in ensuring that [those] personnel are physically fit, and have unimpeachable integrity and judgment."[64] The Court also found compelling the government's interest in ensuring the safety of its employees and the public through institution of measures to prevent drug users from carrying firearms.[65] "Because successful performance of [the] duties [of Customs employees who are directly involved in drug interdiction or required to carry firearms in the line of duty] depends uniquely on their judgment and dexterity," these employees have a reduced expectation of privacy regarding information which bears directly on their fitness.[66]

Through this spectrum of cases, the Court has established a balancing analysis grounded on a broader concept of reasonableness, gradually eliminating the warrant, probable cause and particularization requirements of the Fourth Amendment when the government is not engaging in law enforcement conduct.[67]

II. *JONES V MURRAY*

The district court's opinion in *Jones* applied the *Skinner/Von Raab* principles to the facts of the case after the court concluded that the search was an exception to the law enforcement mandate.[68] The *Jones* court began its analysis by concluding summarily that the extraction of blood and subsequent analysis as delineated under the Code constituted a search for Fourth Amendment purposes.[69] The court acknowledged that in most circumstances, the reasonableness of a search is "measured by a warrant demonstrating probable cause."[70] However, the court also concluded that

64. *Id.* at 670.

65. *Id.* at 670-71.

66. *Id.* at 672. The Court remanded the case as it pertained to persons handling classified materials because the record was "inadequate" for determining the constitutionality of testing those employees. *Id.* at 665.

67. When a search is conducted for law enforcement purposes, or in other words, within a criminal context, the Court will read the Fourth Amendment literally, deferring to its express warrant, probable cause and particularization mandates. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989) (implying that use of the results from the Customs Service's drug testing program for criminal prosecutions of employees would have implicated the ordinary warrant and probable cause requirements).

68. Jones v. Murray, 763 F Supp. 842, 845 (W.D. Va. 1991), *aff'd in part and rev'd in part*, No. 91-6057, 1992 U.S. App. LEXIS 6322 (4th Cir. apr. 7, 1992).

69. *Id.* at 844 (citing Schmerber v. California, 384 U.S. 757 (1966)). The state conceded that taking and analyzing blood was a search, but it argued that the search was reasonable. *Id.*

70. *Id.*

"establishment of a data bank can be classified as a special need, even if the data bank will be used in solving future crimes."[71] Accordingly, the court followed the special needs approach, applying the standard Fourth Amendment interest-balancing formula to ascertain the reasonableness of the search.[72]

The court found two factors identified in *Von Raab* and *Skinner* particularly supportive of the special needs classification of the *Jones* search: (1) the impracticality of demonstrating individualized suspicion,[73] and (2) the existence of well-defined rules governing the intrusion.[74] In *Von Raab*, the Supreme Court determined that articulation of individualized suspicion was infeasible because substance abuse is a latent or hidden condition.[75] Similarly, the *Jones* court reasoned that it would be impossible for the state to obtain a warrant supported by probable cause in the plaintiffs' situation because "[t]he data bank will help solve *future* crimes; no crime has yet been committed, thus no suspicion exists."[76] In addition, the *Jones* court concluded cryptically that a warrant is not required to take and analyze blood because the search was "authorized by state law" and the discretion of officials conducting the search was, therefore, adequately circumscribed.[77]

Notwithstanding similarities to *Skinner* and *Von Raab* apparently confirming that the special needs standard should apply, the *Jones* court still had to overcome a significant hurdle before finally concluding it was the correct standard. The plaintiffs in *Jones* argued that the special needs test was limited to searches outside the "normal needs of law enforcement."[78] The *Jones* plaintiffs asserted that extraction of blood samples with the intent of compiling identification characteristics from the DNA contained therein is a law enforcement function; the data collected would be used to link individuals to future crimes. Thus, the plaintiffs argued that the DNA data bank statute could not be sustained under the special

71. *Id.* at 845.
72. *Id.* at 846-48.
73. *Id.* at 845 & n.6 (citing both National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989) and Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602, 624 (1989)).
74. *Id.* (citing *Skinner*, 489 U.S. at 622).
75. *Von Raab*, 489 U.S. at 668.
76. *Jones*, 763 F. Supp. at 845 (emphasis added).
77. *Id.* at 845-46.
78. *Id.* at 845.

needs analysis.[79]

The special needs test had been limited previously to those circumstances outside the "normal needs of law enforcement."[80] Nonetheless, the court disagreed with plaintiffs' premise that the special needs exception was so limited. The court disposed of the argument by citing the Supreme Court's opinion in *Griffin v. Wisconsin*.[81] In *Griffin*, the Court invoked the special needs exception to uphold a probation officer's search of a probationer's house on less than probable cause that evidence of a crime would be found there.[82] The *Jones* court found support for its conclusion even in Justice Blackmun's *Griffin* dissent: "while denying that probationers should be subject to warrantless searches, [the dissent] recognized that 'the presence of *special law enforcement needs* justifies resort to the balancing test.'"[83]

Having established the propriety of applying a balancing test, the court proceeded to examine the respective interests of the state and the prisoner-plaintiffs, beginning with the state.[84] The court rebuffed plaintiffs' assertion that Virginia does not have a significant interest in conducting the DNA search.[85] The court found the state's interest in deterring and detecting recidivist acts by convicted felons to be significant.[86] In addition, as dictated by the Supreme Court in *Delaware v. Prouse*,[87] the court inquired as to whether the search "is a sufficiently productive mechanism to justify its intrusion upon the fourth amendment interests."[88] The *Jones* court concluded that the DNA analysis sought by the state clearly

79. *Jones*, 763 F. Supp. at 844-45.

80. *See, e.g.*, Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 619 (1989). The *Skinner* Court noted that in most criminal cases, the Court "strikes the balance in favor" of the express procedures provided for by the warrant clause of the Fourth Amendment. *Id.* The Court went further to point out that exceptions to the warrant clause mandates have been recognized when "special needs" outside normal law enforcement create a situation where the probable cause and warrant requirements are impracticable. *Id.* In these cases, the Court has balanced the government and private interests to determine whether the warrant and probable cause requirements could be applied practically. *Id.* *See also* cases cited *supra* note 47.

81. 483 U.S. 868 (1987).

82. *Id.* at 878-79.

83. *Jones*, 763 F. Supp. at 845 (quoting *Griffin*, 483 U.S. at 881 (Blackmun, J., dissenting)).

84. *Id.* at 846.

85. *Id.*

86. *Id.*

87. 440 U.S. 648 (1978).

88. *Id.* at 658-59, *quoted in Jones*, 763 F. Supp. at 846.

met the *Prouse* requirement, summarily asserting that even "[i]f the data bank aids law enforcement in solving less than twenty-five percent of violent crimes, the deterrent effect of such a tool would still appear to be significant."[89] The court refused to judge the efficiency of the state's testing procedure as determinative of the *Prouse* requirement; instead, it applied rational-basis type scrutiny and found the DNA testing procedure sufficient to justify the intrusion on Fourth Amendment rights because the procedure bears a "close and substantial" relationship to the state's goal of detecting and deterring recidivism.[90]

For the other side of the balance, the court considered the extent to which DNA testing intrudes on the plaintiffs' privacy interest.[91] Citing the Supreme Court's observations in *Schmerber v. California*[92] that "blood tests are commonplace and experience has shown that 'for most people the procedure involves virtually no risk, trauma, or pain,'"[93] as well as the rule of that case that "the Constitution does not forbid the States [sic] minor intrusions into an individual's body, " the *Jones* court concluded that any intrusion experienced by the those in plaintiffs' position is de minimis.[94]

Analogizing DNA testing to fingerprinting, the court also reasoned that the felons subject to DNA analysis do not have a legitimate expectation of privacy in the identification characteristics to be compiled and stored.[95] Despite plaintiffs' assertion that DNA analysis may reveal much more about the individual than a fingerprint, the court found no greater intrusion from the DNA test because the only information available to the government from the DNA samples are identification characteristics.[96] Further, the court noted that the Virginia Code restricts the availability of information from the DNA data bank to law enforcement personnel only and provides that the stored information will be distributed only if a DNA sample obtained as evidence of a subsequent crime matches

89. *Id.* at 847 & n.12.
90. *Id.* at 847.
91. *Id.* at 847-48.
92. 384 U.S. 757 (1966).
93. *Jones*, 763 F.Supp. at 847 (quoting *Schmerber*, 384 U.S. at 771).
94. *Schmerber*, 384 U.S. at 771, *quoted in Jones*, 763 F. Supp. at 847.
95. *Jones*, 763 F. Supp. at 847.
96. *Id.* According to the court, "plaintiffs portray[ed] DNA analysis as the key to one's physical and mental predisposition " *Id.*

the sample in the data bank.[97] Finally, the court acknowledged that its characterization of the intrusion on plaintiffs' privacy interest as minimal is aided by the fact that convicted felons "relinquish some expectation of privacy."[98]

In light of this analysis, the court held that the DNA search mandated by the Virginia Code is reasonable and, thus, does not violate the plaintiffs' Fourth Amendment rights.

The Fourth Circuit dispensed with the special needs analysis altogether.[99] While the district court was concerned that individualized suspicion in these cases be portrayed as impracticable to satisfy the special needs criteria, the Circuit court found individualized suspicion irrelevant:

> We have not been made aware of any case, however, establishing a per se Fourth Amendment requirement of probable cause, or even a lesser degree of individualized suspicion, when government officials conduct a limited search for the purpose of ascertaining and recording the identity of a person who is lawfully confined to prison.[100]

The court relied upon the Supreme Court's decisions in *Bell v. Wolfish*[101] and *Hudson v. Palmer*[102] to conclude that convicted felons "lose a right of privacy from routine searches."[103]

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97. *Id.* at 848 (citing VA. CODE ANN. § 19.2-310.5).

98. *Id.* (citing Bell v. Wolfish, 441 U.S. 520, 537 (1979)).

99. Jones v. Murray, No. 91-6057, 1992 U.S. App. LEXIS 6322 (4th Cir. Apr. 7, 1992), *aff'g in part and rev'g in part* 763 F. Supp. 842 (W.D. Va. 1991).

100. *Id.* at *11.

101. 441 U.S. 520 (1979).

102. 468 U.S. 517 (1984).

103. *Jones*, 1992 U.S. App. LEXIS at *12. Judge Murnaghan, dissenting in part, criticized the majority's construction of *Bell* and *Hudson*. *Id.* at *31-33. "Although *Bell* allows for certain invasive search procedures, *Bell* does not suggest that probable cause detainees have abrogated the entire panopoly of privacy protections." *Id.* at * 31. Judge Murnaghan refused to equate the invasive procedure mandated by Virginia with the searches of detainees and prison cells authorized by *Bell* and *Hudson* for maintaining security in prison facilities. "[T]he search involved in the present case, blood testing, violates a privacy interest that even a prisoner, living in close quarters under constant security surveillance, reasonably can expect to enjoy." *Id.* at *32. Nevertheless, Judge Murnaghan inexplicably concluded that the "testing procedures should be reviewed under the standard applied to a search of any individual when such a search is *not based on individualized suspicion*: the privacy interest of the prisoner in remaining free of bodily invasion should be balanced against the state interest in carrying out the search." *Id.* at *30 (emphasis added). This analysis is essentially the same as that employed by the majority to test the reasonableness of the search. Unlike the majority, however, Judge Murnaghan found the testing program justified for those convicted of violent felonies, but

III. ANALYSIS

The conclusions of the courts that the search performed on Jones and his fellow prisoners did not violate their Fourth Amendment rights are flawed in several respects. For example, the district court evades the individualized suspicion requirement by the circular reasoning that proof of individualized suspicion should not be required of the state because no suspicion can exist for the searches authorized. The court's implicit conclusion that legislators may circumvent constitutional rights on the basis of probabilistic evidence is problematic at best. In assessing the productivity of DNA testing as a mechanism to decrease the incidence of recidivism, the court failed to account for negative ramifications such as the possibility of encouraging individuals whose identification characteristics are recorded in the bank to murder rape victims and dispose of their bodies to make detection more difficult. Both the district and circuit courts erred in equating DNA collection with fingerprinting. They ignored the fact that the latter search is strictly circumscribed to the period incident to arrest. Finally, the search undertaken in *Jones* was for law enforcement purposes and thus should have been subject to the express warrant, probable cause and particularization requirements of the Fourth Amendment.

In addition to these analytical flaws, the *Jones* search also unacceptably transgresses individual liberties in direct contradiction to the historical purpose of the Fourth Amendment.

The *Jones* search is problematic conceptually as well. Until this case, courts have required that searches undertaken be in response to an identifiable suspicion of current or past disobedience which would be presently confirmed or denied by the fruits of the search. In contrast, the *Jones* search was conducted to find evidence which would possibly be used in the future to confirm or deny future disobedience. Consequently, the *Jones* search is significantly more arbitrary than any search thus far addressed by the courts.

Finally, policy considerations counsel against sustaining the *Jones* search as constitutional. The justification for the search proffered by the government and accepted by the *Jones* court provides the state with a license to conduct highly intrusive and arbitrary searches.

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unreasonable with respect to non-violent felons. *Id.* at *36-37.

The *Jones* search should be struck down as inconsistent with the mandates of the Fourth Amendment.

A. Reasoning Defects

The district court reasoned that because no individualized suspicion could exist in the plaintiffs' situation, none should be required in the Fourth Amendment calculus it employed.[104] Prior to this case, the Supreme Court had upheld searches without individualized suspicion on the grounds that requiring officials to articulate an individualized suspicion was impractical because the dangerous condition was hidden[105] or because the contact between the government and the individual was too brief for a focused suspicion to develop.[106] Even under these circumstances, however, the presence of a condition subject to regulation was suspected but nondetectable. In *Jones*, no suspicion can exist because no regulated condition is present; the plaintiffs have not committed a crime for which the DNA samples would serve as evidence nor is it certain that they ever will commit such a crime. It is absurd and immensely self-serving to hold that because the court cannot possibly satisfy one requirement for a constitutional search, it will do away with the requirement instead of invalidating the intrusion.

The district court also relied too heavily on the Virginia statute's restrictions on DNA analysts and law enforcement officers for its conclusion that the law adequately circumscribed discretion.[107] Although the statute is written to minimize the discretion of those conducting the searches and compiling the DNA files, the decision of Virginia legislators to search certain felons incarcerated in Virginia prisons was itself an exercise of discretion. Apparently, the legislature acted based on a pair of studies proffered by the state defense counsel showing that convicted felons are likely to commit crimes after their release from prison.[108] Without address-

104. *See supra* notes 75-76 and accompanying text.

105. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 537 (1967) (holding that an area-inspection of several buildings absent suspicion associated with any particular building is reasonable because "many conditions are not observable from outside the building ").

106. United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (concluding that individualized suspicion "would be impractical" in searches for automobiles for illegal aliens "because the flow of traffic tends to be too heavy to allow the particularized study of a given car ").

107. *See supra* note 77 and accompanying text.

108. Jones v. Murray, 763 F Supp. 842, 846 n.9 (W.D. Va. 1991), *aff'd in part and*

ing the validity of recidivism rates,[109] the court accepted such probabilistic data as adequate cause for the legislature's action. The court's opinion begs the question of the propriety of a legislative body relying on inherently uncertain probabilistic evidence as a basis for circumventing individuals' constitutionally protected rights. Reliance on statistical evidence is particularly troublesome because no rules exist to guide either courts or legislatures in determining threshold probabilities above which individual rights may be cast aside for the sake of some greater governmental purpose.[110]

The district court also concluded that the DNA data bank would increase the probability of detecting repeat offenders, creating a deterrent effect sufficiently significant to justify abdication of the plaintiffs' Fourth Amendment rights.[111] The Fourth Circuit concurred.[112] The courts failed to consider other potential effects which could render the data bank a detriment to deterrence. For example, an increased likelihood of detection could lead felons whose identification characteristics are on file to murder their rape victims and dispose of the bodies to destroy physical evidence that might be matched to data bank samples. Thus, the data bank could actually have the effect of *decreasing* detection rates.

In addition, the courts analogized DNA samples to fingerprints because both can be used for identification purposes. Finding no legitimate expectation of privacy in one's identification characteristics, they concluded that plaintiffs have no legitimate expectation of

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rev'd in part, No. 91-6057, 1992 U.S. App. LEXIS 6322 (4th Cir. Apr. 7, 1992).

109. The validity of recidivism rates is a subject of considerable dispute. *See, e.g.*, PETER HOFFMAN, NATIONAL INSTITUTE OF JUSTICE, PREDICTING CRIMINALITY (1988).

110. *Compare* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505, 507-08 (1989) (striking down city's set-aside program because inconclusive statistical data failed to demonstrate compelling government interest and because such inconclusive evidence could not support a claim that the set-aside program was narrowly tailored to remedy past discrimination); McCleskey v. Kemp, 481 U.S. 279, 306-07, 294-95 (1987) (holding that a statistical showing of risk that a statute was discriminatorily applied in Georgia failed to make a capital sentence disproportionate or arbitrary and capricious under the Eighth Amendment and that statistical proof was not sufficient to prove purposeful discrimination under the Fourteenth Amendment) *with* Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971) (holding that a plaintiff can prove employment discrimination under Title VII of the Civil Rights Act of 1964 through statistical data showing the defendant's hiring practices had a racially disparate impact); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (concluding that an Alabama redistricting plan was racially discriminatory based on statistical evidence of the number of "Negro voters" who would probably be removed from the district if the plan were implemented).

111. *Jones*, 763 F. Supp. at 846-47.

112. *Jones*, 1992 U.S. App. LEXIS at *15-16.

privacy with respect to the DNA testing.[113] The courts' analogy to fingerprinting is flawed, however. Fingerprints may only be obtained in furtherance of a criminal investigation, i.e., incident to a lawful arrest.[114] The identification characteristics gathered from the *Jones* search, in contrast, will be used for law enforcement purposes which arise, if at all, after the plaintiffs have been released from prison, i.e., post-arrest. Thus, any rationale advanced to justify fingerprinting, including the need for the government to know with absolute certainty the identity of the person arrested or whether the person is wanted elsewhere and the need to ensure identification in the event the person flees prosecution,[115] are moot by the time the *Jones* search is conducted. As a consequence, the analogy between fingerprints and DNA samples employed by the courts is misleading.[116]

Finally, the search undertaken in *Jones* was for law enforcement purposes and, thus, should have been subject to the express warrant, probable cause and particularity requirements of the Fourth Amendment. The district court relied on the Supreme Court's holding in *Griffin v. Wisconsin* that a balancing test rather than the express mandates of the Fourth Amendment should be used to

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113. *Jones*, 763 F. Supp. at 847; *Jones*, 1992 U.S. App. LEXIS at *12-13.

114. *See* Hayes v. Florida, 470 U.S. 811, 817 (1985) ("There is support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting if there is a reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime. "); Napolitano v. United States, 340 F.2d 313, 314 (1st Cir. 1963) (stating that there was no merit in defendants' argument that the taking of fingerprints immediately prior to being admitted to bail and their subsequent use violates the Fourth Amendment rights of the defendants because the "[t]aking of fingerprints in such circumstances is universally standard procedure "); *see also* 1 LAFAVE, *supra* note 30, § 2.6(a), at 365 (stating that "it is well established that the taking of fingerprints is permissible incident to a lawful arrest "). *But see* United States v. Dionisio, 410 U.S. 1, 5-8 (1973) (analogizing in dicta fingerprinting to voice exemplars which the Court held were not searches but mere observations of a characteristic, a person's voice).

Professor LaFave questions this interpretation of the *Dionisio* holding since the support for this proposition from Davis v. Mississippi, 394 U.S. 721 (1969), was "not included [in the *Davis* opinion] for the purpose of showing that fingerprinting is not a search but rather for the purpose of showing that detention for such a limited intrusion might 'comply with the Fourth Amendment even though there is no probable cause in the traditional sense.'" 1 LAFAVE, *supra* note 30, § 2.6(a).

115. 2 LAFAVE, *supra* note 30, § 5.3(c).

116. *See Jones*, 1992 U.S. App. LEXIS at *34 n.2 (Murnaghan, J., dissenting in part) ("[T]he search involved here in the blood testing of potential future criminals is significantly more akin to the gathering of evidence to support conviction at trial than to the activity of identifying felons within a prison facility.").

analyze the reasonableness of the search.[117] The *Griffin* Court found that the search of a probationer by his probation officer was undertaken to "ferret out crime" and decrease recidivism rates, and therefore constituted a special need despite the search's law enforcement overtones.[118] However, the court misconstrued the *Griffin* holding. The *Griffin* holding was limited to the probation context; the search was justified because a probationer remains within the confines of the penal system[119] and, thus, has a diminished expectation of privacy [120]

In *Jones*, the courts fail to recognize that the fruits of the DNA search, identification characteristics, will be used against the plaintiffs in a law enforcement context *after* they are free of the confines of the penal system. The extent of the intrusion on the plaintiffs' privacy interests should be measured at that time, not when blood samples are collected. After the plaintiffs are released from prison, their expectation of privacy is restored along with most of their other constitutional rights to the level enjoyed by all others not incarcerated.[121] Thus, the identification characteristics garnered from the *Jones* search will be used for law enforcement purposes against individuals with a substantial portion of their constitutional rights intact and the search should consequently be subject to the express mandates of the Fourth Amendment.

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117. *Jones*, 763 F. Supp. at 845 (relying on Griffin v. Wisconsin, 483 U.S. 868, 875-76 (1986)).

118. *Griffin*, 483 U.S. at 874-75.

119. *Id.* at 873 (characterizing probation as "one of the points in a continuum of punishment").

120. *Id.* at 880.

The Fourth Circuit stretches the holding of *Griffin* even further to support is conclusion that no particularized suspicion is required. According to the circuit court, "[e]ven probationers lose the protection of the Fourth Amendment with respect to their right to privacy against searches of their homes pursuant to an established program to ensure rehabilitation and security." *Jones*, 1992 U.S. App. LEXIS at *12 (citing *Griffin*). However, because the probation officer had reasonable grounds to believe he would find contraband in Griffin's house, the *Griffin* opinion cannot be fairly construed as the *Jones* court suggests. *See Griffin*, 483 U.S. at 871.

121. A list of the few, but significant, rights of ex-convicts circumscribed frequently by many state legislatures include the right to vote, to hold public office, to serve on juries, to testify, to make contracts and to sue in court. *See* HARRY E. ALLEN & CLIFFORD E. SIMONSEN, CORRECTIONS IN AMERICA 268 (1975).

It should be noted that this discussion assumes that individuals affected are, at some point after their release from penal institutions, not subject to parole conditions which may abdicate further their individual rights.

B. Historical Insights

A DNA data bank of the character at issue in *Jones* is a vehicle for the type of unfettered discretion in the hands of government officials the founding fathers sought to eliminate through the Fourth Amendment. In the colonial times, writs of assistance empowered English authorities to search the homes of colonists without any prior justifiable suspicion that the home presently contained illegal goods.[122] In effect, the English officials were able to conduct searches of homes for the sole purpose of ferreting out evidence of crimes they did not know had been committed.

Similarly, the *Jones* search is not predicated on any suspicion that the individual subject to it is presently committing a crime. Authorities search the prisoners hoping to obtain evidence of a crime they cannot know will ever be committed.[123] This is precisely the type of search that the Fourth Amendment was designed to eliminate.

C. Conceptual Flaws

It is axiomatic that the ultimate goal of our law enforcement and judicial systems is to prove or disprove the guilt of a person suspected of wrongdoing. The search is one of the fundamental tools used by the government to accomplish this objective. Use of this tool must, however, be balanced against the protection of individual liberties from arbitrary acts of the government. The Fourth Amendment is the primary vehicle by which those liberties are protected.

A fundamental premise of any Fourth Amendment analysis must be that suspicion of current or past disobedience is present, for this is the ultimate check on arbitrary exercise of government power. The degree to which any act can be characterized as arbitrary varies directly with the uncertainty of purpose which prompts the act. In other words, the more uncertain the existence of a question, the more arbitrary the acts undertaken to satisfy the query Conversely, acts done in pursuit of determining the answer to a certain, objectively identifiable inquiry are purposeful and thus not arbitrary [124] In the Fourth Amendment context, requiring current

122. *See supra* notes 26-28 and accompanying text.

123. *See supra* note 76 and accompanying text.

124. This comment addresses the substantive rather than the procedural adequacy of the

individualized suspicion thus ensures that the search is legitimate and purposeful and that it is conducted to ascertain the answer to a concrete, objectively identifiable and certain question. Articulation of this suspicion ensures that the search is objectively justifiable, i.e., there is an identifiable suspicion of wrongdoing which is to be presently proved or disproved by the results of the search.

Courts have implicitly required present use in each of the search contexts addressed prior to *Jones*. In the law enforcement context, for instance, the government must demonstrate that it has more than mere suspicion, i.e., probable cause, to believe that evidence of a current or past crime will be found in a particular location.[125] There must be a current belief that the fruits of the search will be presently used to aid in proving or disproving the innocence of a person currently suspected of having committed a crime.

Likewise, in circumstances described as exceptions to the express mandates of the Fourth Amendment, the government is required to articulate a reasonable suspicion of current or past wrongdoing inferred from specific facts.[126] Even in the special needs contexts in which the Court requires no warrant or articulation of probable cause, suspicion of current or past disobedience is necessary before the search will pass constitutional muster.[127] Finally, officials conducting *Skinner* and *Von Raab* searches need not demonstrate the existence of particularized suspicion in the sense that an individual must be identified as the target of the search,[128] but must at least articulate a suspicion that an undetected, yet present, individual is currently functioning outside stated regulations.[129] In all of these circumstances, the searches will yield information

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acts. The process of conducting the acts is assumed to be legitimate.

125. *See, e.g.*, United States v. Roberts, 333 F. Supp. 786, 787 (1971) (declaring that "[a] search warrant will not issue upon an affidavit reciting only the anticipation of a future offense"); *see also supra* note 36 and accompanying text.

126. See, for example, Terry v. Ohio, 392 U.S. 1, 24 (1968) in which there is a requirement that the search yield information which would confirm or deny the suspicion of the officer that the individual being searched "is armed and presently dangerous" and thus poses a threat to the officer or to others.

127. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (requiring, *inter alia*, "reasonable grounds for suspecting the search will turn up evidence that the student *has violated or is violating* either the law or the rules of the school" (emphasis added)).

128. *See supra* note 67 and accompanying text.

129. In *Skinner*, for instance, the search was conducted to detect the presence of drugs in the urine of railway employees. *See supra* note 52 and accompanying text. Similarly, the search in *Von Raab* was conducted to detect the existence of drug use by Customs Service employees. *See supra* notes 61-62 and accompanying text.

which will be presently used to confirm or deny a current suspicion that members of a group are disobeying regulations.

In *Jones*, however, nothing will be presently proven by the search performed on the plaintiffs. Unlike the cases in the categories described in the preceding paragraph, there is no pending question of current guilt which will be presently solved as a result of the search. Rather, the *Jones* search is conducted merely to obtain identification characteristics projected for use to detect crimes in the future. Events which occur in the future are patently uncertain. And recall the assertion that the arbitrariness of acts conducted with the objective of answering a question is directly proportional to the uncertainty of the existence of the question. Because recidivism and, thus, the question of the searched individual's guilt is ultimately uncertain, the *Jones* search is arbitrary and intolerable under the Fourth Amendment.

D. Policy Considerations

The *Jones* case is the most recent step on the path toward an Orwellian state in which government is given license to freely transgress the privacy interests of individuals under the auspices of deterrence and detection of crime. By upholding the *Jones* search, the courts authorized the state to conduct highly intrusive searches, justified only by the state's interest in deterring and detecting crimes which may never occur. This is pure, unfettered discretion ripe for abuse. As a result of *Jones*, the state can search virtually any person or place under the pretense of obtaining information to be used for preventing or detecting future crimes.

Even if the courts choose to limit the *Jones* justification to the prevention of high probability crimes,[130] significant privacy inter-

130. After *Von Raab*, it is questionable whether the Court will constrain the scope of the search at all. Justice Scalia noted in his dissent that the drug testing policy upheld in *Von Raab* could not solve any present problems in the Customs Service because the government failed to provide evidence supporting the assertion that there was disobedience in the ranks:

> The Court's opinion will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees
>
> What is absent in the Government's justifications — notably absent, revealingly absent, and as far as I am concerned dispositively absent — is the recitation of *even a single instance* in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribetaking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified

ests are implicated. For instance, as a result of the *Jones* holding, the state could conceivably authorize its police to stop any car traveling within a ten mile radius of a high crime area to record the identity and description of the driver and any passengers for crime prevention and deterrence purposes. This application of *Jones* would effectively overrule *Terry* because no reasonable suspicion of current wrongdoing would be necessary to detain and search the individuals. Alternatively, the state might choose to operate roving patrols in high crime neighborhoods entering residents' homes and recording the appliances found there. Then, in the future, the patrols could re-enter the homes, compare the initial record with a current inventory of appliances in the house and require the residents to justify legitimate acquisitions should additional appliances be found.

While the statute at issue in *Jones* confines the search to those persons the state believes are predisposed to committing a future crime, there is no legitimate reason for limiting the scope of the search in such a manner if the state's interest in preventing or detecting future crimes is sufficiently significant to justify compromise of Fourth Amendment rights. The state has not developed a fool-proof method to ascertain the identity of those who will most certainly commit a crime in the future. Anyone may commit a crime. Therefore, under the detection and prevention rationale, the state should arguably be allowed to extend its justification to require that blood samples be taken from everyone at birth, the DNA analyzed and identification characteristics recorded. What better method of detecting or deterring future crimes than to record identification characteristics of the entire population?

The potential for harassment and other abuses of discretion resulting from the offspring of *Jones* is thus evident. The Virginia Code and others like it cannot be permitted to stand.

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information, was drug use.
National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681, 683 (1989) (Scalia, J., dissenting).